IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 7277 of 2002

with

CRIMINAL MISC.APPLICATION No 7278 o 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

1 to 5 NO

RAMESHBHAI M SUTHAR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 7277 & 7278 of 2002

MR LAXMANBHAI A AMAR for Petitioner No. 1

MR NV PANCHOLI APP for Respondent No. 1

..... for Respondent No. 2

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 17/10/2002

ORAL JUDGEMENT

1. By these petitions under Section 482 of the Code of Criminal Procedure, 1973 ('the Cr.PC' for short), the petitioner has prayed for quashing of the Criminal Cases Nos.2060 of 2000 and 5523 of 2000 pending in the Court of the learned Judicial Magistrate, First Class (JMFC) at Junagadh. In both the cases, the petitioner is the original accused person and the complainant is also the same. It is alleged in the original complaints that the cheques issued by the petitioner had been dishonoured and, after issuance of the demand notice within the prescribed time, the complaints for the offences under Section 138 of the Negotiable Instruments Act, 1881 ('the Act' for short) and Section 420 of the Indian Penal Code were made. The learned JMFC, on 24.4.2000, took cognizance and issued summons for the offence under Section 138 of the Act. The first attempt of the petitioner at discharge under Section 227 or Section 258 of the Cr.PC was spurned by the order dated 28.8.2002 on the ground that the contentions of the petitioner were subject-matter of evidence.

2. The learned counsel for the petitioner vehemently argued at length to submit that the complainant had not filed any authority along with the complaint or made any averment to indicate his authority to make the complaint on behalf of the company which was the payee of the cheques which had been returned unpaid. It was, however, seen that in the title itself as well as in the first paragraph of the complaints, the complainant was stated to be the administrator of the payee company and the complaint was filed in the name of the payee company itself.

2.1 It was vehemently argued that the petitioner did not owe any debt and that there was no existing liability against which the cheques were issued. Another contention sought to be canvassed even without filing a copy of the demand notice was that proper notice as envisaged in Section 138 of the Act was not issued and served upon the petitioner and that the list of witnesses was also not submitted in the trial Court. Again, factually, it was found from the complaint itself that the complainant had cited himself as a witness.

3. It is not necessary to enter into the details of the factual background given out by the petitioner as regards the nature of transaction between the parties as

also the understanding that preceded the issuance of the cheques for the simple reason that such contentions would be the subject-matter of proof and defence. Prima facie, the presumption in favour of holder of the cheque as provided in Section 139 of the Act should prevail and any observation with regard to the alleged debt or liability of the petitioner would at this stage be premature and superfluous. As recently held by the Supreme Court in M.M.T.C. LTD. v. M/S. MEDCHL CHEMICALS AND PHARMA (P) LTD. [2002 Cri.L.J. 266], the criterion fixed for the complainant under Section 142 would be satisfied where the complaint is in the name and on behalf of the company who is the payee of the cheque. Merely because the complaint is signed and presented by a person, who is neither an authorized agent nor a person empowered under the Articles of Association or by any resolution of the board to do so is no ground to quash the complaint. It is open to the de jure complainant company to seek permission of the court for sending any other person to represent the company in the court. It is also clearly

held that, even presuming that initially there was no authority, still the company can, at any stage, rectify that defect. It is further observed in the same judgment that inherent power of quashing criminal proceedings should be exercised very stringently and with circumspection. Court exercising inherent powers is not justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the complaint. The inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice. The Court, at this stage, could not go into merits and/or come to any conclusion as regards the existing debt or liability. It is not necessary for the complainant to allege specifically in the complaint that there was a subsisting liability or an enforceable debt for discharging which the cheques were issued. There is, therefore, no requirement of specifically alleging in the complaint the nature or existence of liability. It is clearly held that the burden of proving that there was no existing debt or liability was on the respondent, which onus can be discharged at the time of trial. At this stage, merely on the basis of averments in the petitions, the High Court cannot conclude that there was no existing debt or liability.

3.1 As regards service of notice, it is recently held by the Supreme Court in RAJNEESH AGGARWAL v. AMIT J. BHALLA [AIR 2001 SC 518] that the object of issuing notice indicating the factum of dishonour of cheques is

to give an opportunity to the drawer to make payment within 15 days. Bearing in mind the object of issuance of such notice, it must be held that the notices cannot be construed in a narrow technical way without examining the substance of the matter. In the facts of the present case, it is clearly averred in the complaint that notices dated 7.3.2000 and 5.9.2000 were issued and one of them was served upon the petitioner and another was returned with the remark of "not claimed".

3.2 The learned counsel for the petitioner lastly relied upon a judgment of the Mumbai High Court in HITEN SAGAR & ANOTHER v. IMC LTD. reported in I (2002) BC at page 221. It was pointed out from the said judgment that it was a well-settled principle of criminal law that a penal provision of a statute has to be strictly construed and if in a wider connotation it will amount to disadvantage to the accused, such a wider connotation cannot be accepted. Accordingly, for constituting the offence under Section 138 of the Act, the cheque must be drawn for discharge of the liability of the drawer of the cheque and if the cheque was drawn for the liability of another person without creating any document, it would not come under Section 138 of the Act. It is not clear whether that judgment was rendered in a petition under Section 482 of the Cr.PC. However, in view of the aforesaid observations of the Supreme Court in the case of M.M.T.C (supra) as also in view of the presumption spelt out in Section 139 of the Act, the question as regards the existing liability or debt of the petitioner cannot be gone into at this stage in this petition.

4. In the above facts and circumstances, no case having been made out for exercising the extraordinary powers of this Court under Section 482 of the Cr.PC, the petitions are summarily rejected.

Sd/-

(D.H.Waghela,J.)

(KMG Thilake)